

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ALLEN L. WISDOM,

Plaintiff,

v.

STATE OF NEVADA, et al.,

Defendants.

3:06-CV-00094-PMP-RAM

ORDER

Presently before the Court is Defendant Jeffrey Dickerson's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim for Which Relief May be Granted (Doc. #174), filed on March 19, 2010. Plaintiff filed an Opposition (Doc. #211) on May 12, 2010. Defendant filed a Reply (Doc. #213) on May 24, 2010.

I. BACKGROUND

In 1993, Plaintiff Allen Wisdom began a Chapter 7 bankruptcy proceeding in Reno, Nevada.¹ (Defs.' Position Br. (Doc. #155).) At the conclusion of his bankruptcy proceeding in 1999, Plaintiff filed a legal malpractice action in Nevada state court against the law firm that represented him in the bankruptcy proceeding. (Id.) The parties settled the malpractice action, referred to as Wisdom 1, in October 2001. (Id., Ex. 1.) In February 2004, Plaintiff filed a second lawsuit in Nevada state court, referred to as Wisdom 2. (Compl. (Doc. #4) ¶ 6.) The defendants in Wisdom 2 included Plaintiff's attorney from Wisdom 1, Jeffrey A. Dickerson ("Dickerson"), as well as various other individuals and

¹ When ruling on a motion to dismiss, the Court may take judicial notice of matters of public record, including prior proceedings in state or federal court. See Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 866 n.1 (9th Cir. 2004).

1 entities including: David R. Grundy (“Grundy”); Lemons, Grundy & Eisenberg (“LGE”);
2 Attorneys Liability Protection Society (“ALPS”); ALPS, Inc.; Ernest Adler (“Adler”);
3 Kilpatrick, Johnston & Adler (“KJA”); and John Anthony Fetto (“Fetto”). (Id.)

4 In Wisdom 2, Plaintiff asserted claims against Defendant Dickerson for legal
5 malpractice, related claims, and conversion. (Id. ¶ 7.) Plaintiff asserted claims against
6 Dickerson, Grundy, LGE, ALPS, Adler, KJA, and Fetto for civil conspiracy, fraud,
7 violations of Civil Rights, and violations of Nevada Racketeer Influenced and Corrupt
8 Organizations (“RICO”) statutes. (Id.)

9 In May 2006, the Nevada trial court granted summary judgment to Defendants
10 Adler and KJA in Wisdom 2. (Defs. Position Br. (Doc. #155), Ex. 3.) In June 2006, the
11 Nevada trial court ordered the complaint stricken and dismissed the remainder of the case
12 with prejudice due to Plaintiff’s repeated failure to obey court orders, attend his own
13 deposition, and produce discovery. (Id., Ex. 4.) Plaintiff appealed this decision to the
14 Nevada Supreme Court, which affirmed both the summary judgment and dismissal of
15 Plaintiff’s claims against the remaining defendants in Wisdom 2 on February 11, 2008.
16 (Id., Ex. 5.)

17 Prior to the dismissal of Wisdom 2, Plaintiff filed this action on February 17,
18 2006, against all of the Wisdom 2 Defendants as well as the State of Nevada; Connie
19 Steinheimer (“Steinheimer”); Wesley Ayers (“Ayers”); Eugene Wait Jr. (“Wait”); Sharon
20 Benson (“Benson”); the Wait Law Firm; the Estate of Phillip Bartlett (“Bartlett”); Scott
21 Glogovac (“Glogovac”); Gregory Livingston (“Livingston”); Lorraine Fitch (“Fitch”);
22 Western Surety Company; and Burton, Bartlett & Glogovac (“BBG”). Plaintiff’s
23 Complaint asserts eight claims for relief, claims two through seven being relevant to
24 Defendant Dickerson.

25 This Court previously dismissed Plaintiff’s claims against all Defendants on a
26 variety of grounds. (Order (Doc. #109).) Plaintiff appealed the dismissal of his claims to

1 the United States Court of Appeals for the Ninth Circuit. The Court of Appeals reversed
 2 the dismissal and remanded the matter for further proceedings. (Mem. (Doc. #143).) Upon
 3 remand, this Court ruled that the previously ordered dismissals of Defendants State of
 4 Nevada, Steinheimer, Ayers, Wait, Benson, and the Wait Law Firm stood and dismissed
 5 these Defendants from this action. (Order (Doc. #169).) This Court further ordered that for
 6 the remaining Defendants, any of Plaintiff's claims based on conduct pre-dating the filing
 7 of Plaintiff's complaint in Wisdom 2 were barred by claim preclusion. (Id.)

8 Defendant Dickerson now moves to dismiss Plaintiff's claims of civil conspiracy;
 9 violation of civil rights pursuant to 42 U.S.C. § 1981, § 1983, § 1985, and § 1986; fraud;
 10 defamation; abuse of process; and violations of Federal RICO statutes for failure to state a
 11 claim and for failure to plead fraud with particularity. Plaintiff opposes, arguing that
 12 Defendant Dickerson has not specified how Plaintiff's claims are inadequately pled.

13 **II. MOTION TO DISMISS**

14 Federal Rule of Civil Procedure 8(a)(2) requires a pleading to contain "a short
 15 and plain statement of the claim showing that the pleader is entitled to relief." Such a
 16 statement is necessary to "give the defendant fair notice of what the . . . claim is and the
 17 grounds upon which it rests." William O. Gilley Enter., Inc. v. Atl. Richfield Co., 588 F.3d
 18 659, 667 (9th Cir. 2009) (per curiam) (quotation omitted). Dismissal of a claim under Rule
 19 12(b)(6) for failure to state a claim is appropriate when the complaint fails to satisfy Rule
 20 8(a). Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).²

21 There is a strong presumption against dismissing an action for failure to state a
 22 claim. Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997). When deciding a

23
 24 ² In his opposition to Defendant's Motion to Dismiss, Plaintiff argues that Twombly does not
 25 apply in the present case because Plaintiff filed this action before Twombly was decided. Twombly
 26 clarifies the pleading standards set forth in Rule 8(a)(2) and is applicable to pleadings filed before it
 was handed down. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944, 1949-52 (2009) (relying on Twombly
 even though Iqbal filed his complaint before Twombly was decided).

1 motion under Rule 12(b)(6), the Court accepts “all well-pleaded allegations of material
 2 fact[] as true and construe[s them] in a light most favorable to the non-moving party.”
 3 Wyler Summit P’ship v. Turner Broad Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998).
 4 However, the Court is not required to accept as true allegations that are merely conclusory.
 5 Spewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). “The issue is not
 6 whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer
 7 evidence in support of the claims.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)
 8 (overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982)). To
 9 survive a Rule 12(b)(6) motion, the plaintiff must do more than merely assert legal
 10 conclusions; rather, the complaint must contain sufficient factual allegations to provide
 11 plausible grounds for entitlement to relief. Twombly, 550 U.S. at 555-56 (mere recitation
 12 of the legal elements of a cause of action is insufficient to survive a Rule 12(b)(6) motion).

13 **A. Count Two: Civil Conspiracy**

14 In Nevada, “an actionable conspiracy consists of a combination of two or more
 15 persons who, by some concerted action, intend to accomplish an unlawful objective for the
 16 purpose of harming another, and damage results from the act or acts.” Hilton Hotels Corp.
 17 v. Butch Lewis Prods., Inc., 862 P.2d 1207, 1210 (Nev. 1993) (quoting Sutherland v. Gross,
 18 772 P.2d 1287, 1290 (Nev. 1989)). Further, “[t]o prevail in a civil conspiracy action, a
 19 plaintiff has to prove an explicit or tacit agreement between the tortfeasors.” GES, Inc. v.
 20 Corbitt, 21 P.3d 11, 15 (Nev. 2001). Use of a term such as conspiracy by itself is
 21 insufficient to survive a Rule 12(b)(6) motion, but may be sufficient if accompanied with
 22 specific allegations, such as identifying a written agreement giving rise to the conspiracy or
 23 alleging the conspirators “committed acts that are unlikely to have been undertaken without
 24 an agreement.” Mendocino Env’tl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301 (9th Cir.
 25 1999) (quotation omitted); See also Twombly, 550 U.S. at 557. A complaint for civil
 26 conspiracy must plead the “specific time, place, [and] person involved in the alleged

1 conspiracies.” Id. at 565 n.10 (holding the plaintiff’s complaint was insufficient because it
2 merely identified a general seven year period in which the conspiracy allegedly occurred
3 without alleging a specific time, place, or person involved).

4 In count two of his Complaint, Plaintiff alleges that Defendant Dickerson, along
5 with other Defendants and employees of the State, conspired to violate Plaintiff’s rights
6 pursuant to the Americans with Disabilities Act; violate Plaintiff’s constitutional and civil
7 rights; commit fraud against Plaintiff; libel and defame Plaintiff; abuse process; and engage
8 in a racketeering enterprise. Despite several statements alleging a civil conspiracy,
9 Plaintiff’s Complaint fails to allege facts sufficient to comply with Rule 8’s pleading
10 standard. While Plaintiff offers legal conclusions that Defendant Dickerson engaged in a
11 civil conspiracy, Plaintiff’s Complaint does not include factual allegations as to Dickerson’s
12 actions giving rise to such claims.

13 Paragraph 60 of Plaintiff’s Complaint alleges Defendant Bartlett met ex parte
14 with Judge Steinheimer on April 27, 2004, to wrongfully obtain a signature on an order.
15 Paragraph 61 of Plaintiff’s Complaint alleges Defendant Wait engaged in improper ex parte
16 communications with the Discovery Commissioner on April 7, 2005. Paragraph 62 of
17 Plaintiff’s Complaint alleges Defendants Wait and Benson engaged in ex parte
18 communication with Judge Steinheimer on April 15, 2005. While Plaintiff’s Complaint
19 makes these allegations of ex parte communications with judicial officials, it alleges neither
20 how Dickerson was personally involved in these communications nor a specific agreement
21 indicative of a conspiracy. Plaintiff’s allegations do not state acts that were unlikely to have
22 been undertaken absent a conspiracy amongst Defendants and two state judicial officers.
23 Rather, Plaintiff’s claims against Defendant Dickerson rest on conclusory statements that
24 Defendants engaged in a conspiracy.

25 In his opposition, Plaintiff argues his allegations against Dickerson result from
26 the acts of Dickerson’s counsel Wait, the Wait Law Firm, and Benson. However, assuming

1 an agency relationship, this Court previously dismissed the claims against Defendants Wait,
 2 the Wait Law Firm, and Benson because the Complaint failed to give Defendants notice of
 3 the claims against them. (Order (Doc. #109).) Plaintiff then filed a notice (Doc. #124) to
 4 stand on his Complaint with respect to the dismissed Defendants. Plaintiff's conspiracy
 5 claims against the dismissed Defendants failed because the Complaint, among other
 6 deficiencies, failed to allege facts indicating an agreement between co-conspirators.
 7 Because Plaintiff's Complaint fails to allege facts sufficient to state a claim with respect to
 8 Defendants Wait, the Wait Law Firm, and Benson, any claims of liability for Dickerson
 9 based on an agency relationship with these Defendants also must fail. Therefore, the Court
 10 will grant Defendant Dickerson's Motion to Dismiss Plaintiff's civil conspiracy claim.

11 **B. Count Three: Violation of Civil Rights Act and Constitutional Rights**

12 In count three of his Complaint, Plaintiff alleges Defendant Dickerson violated
 13 his civil rights pursuant to 42 U.S.C. § 1981, § 1983, § 1985(2) and (3), and § 1986.
 14 Plaintiff also alleges he is entitled attorney's fees pursuant to 42 U.S.C. § 1988.

15 **1. Section 1981**

16 Section 1981 states, "[a]ll persons within the jurisdiction of the United States
 17 shall have the same right . . . to make and enforce contracts, to sue, be parties, give
 18 evidence, and to the full and equal benefit of all laws . . . as is enjoyed by white citizens."
 19 To support a claim under § 1981, plaintiffs must allege facts indicating that the plaintiffs
 20 were discriminated against or denied such rights "on account of their race or ethnicity."
 21 Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1123 (9th Cir. 2008).

22 In the present case, Plaintiff does not allege discrimination based on his race or
 23 ethnicity. Therefore, the Court will dismiss Plaintiff's claims based on section 1981.

24 **2. Section 1983**

25 Section 1983 offers no substantive legal rights, but rather provides procedural
 26 protections for federal rights granted elsewhere. Albright v. Oliver, 510 U.S. 266, 271

1 (1994). To state a claim under § 1983, “a plaintiff must both (1) allege the deprivation of a
2 right secured by the federal Constitution or statutory law, and (2) allege that the deprivation
3 was committed by a person acting under color of state law.” Anderson v. Warner, 451 F.3d
4 1063, 1067 (9th Cir. 2006). Further, “individual liability under § 1983 arises only upon a
5 showing of personal participation by the defendant.” Avalos v. Baca, 596 F.3d 583, 587 n.3
6 (9th Cir. 2010) (citation omitted).

7 When a conspiracy between a non-state actor and the State is alleged, “an
8 agreement or ‘meeting of the minds’ to violate constitutional rights must be shown.”
9 Mendocino Env'tl. Ctr., 192 F.3d at 1301 (quotation omitted). When a plaintiff merely
10 asserts that a conspiracy between private individuals and the state exists, but does not allege
11 facts in support of the existence of such a conspiracy, dismissal under Rule 12(b)(6) is
12 appropriate. Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 502 (9th Cir. 1979).

13 The right to “[d]ue process requires notice reasonably calculated . . . to apprise
14 interested parties of the pendency of the action and afford them an opportunity to present
15 their objections.” United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1378 (2010)
16 (quotation omitted). An equal protection claim requires a showing that the state actor
17 treated classes of people differently based on their class without justification, “[t]he Equal
18 Protection Clause ensures that all persons similarly situated should be treated alike.”
19 Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (quotation omitted).

20 Here, Plaintiff alleges that Defendant Dickerson violated § 1983 by conspiring
21 with the State of Nevada to deny Plaintiff his rights to due process and equal protection
22 under the Fourteenth Amendment. While Plaintiff asserts that Dickerson acted in concert
23 with the State of Nevada, Plaintiff does not allege facts in support of the existence of the
24 conspiracy or indicate, other than offering conclusory statements, how Defendant Dickerson
25 personally participated in depriving Plaintiff of his constitutional rights. Further, Plaintiff's
26 Complaint does not allege facts indicating a “meeting of the minds” between state actors

1 and private individuals necessary to allege a conspiracy. Plaintiff, however, does claim that
2 ex parte communications by Defendants caused Plaintiff to incur expense traveling to Reno
3 to appear in a hearing in state court. However, in regards to his due process claim, Plaintiff,
4 by his own allegations, had both notice and opportunity to be heard with respect to the
5 hearings allegedly fraudulently obtained by Defendants. Therefore Plaintiff's due process
6 rights were not violated. In regards to his equal protection claim, Plaintiff did not plead an
7 agreement between Defendant Dickerson and state actors sufficient to allege state action.
8 Further, Plaintiff's Complaint does not allege how Plaintiff was denied equal protection of
9 the laws as compared to similarly situated persons. Accordingly, the Court will dismiss
10 Plaintiff's § 1983 claims.

11 **3. Section 1985(2)**

12 The second portion of 42 U.S.C. § 1985(2) protects against private conspiracies
13 aimed at obstructing justice in state courts based on discriminatory animus. See Portman v.
14 Cnty. of Santa Clara, 995 F.2d 898, 909 (9th Cir. 1993). To survive a motion to dismiss,
15 the plaintiff must plead facts sufficient to allege (1) obstruction of justice (2) motivated by
16 class based animus. Id.

17 Here, Plaintiff asserts that Defendant Dickerson conspired with other Defendants
18 to obstruct justice in the Nevada state court system. Plaintiff further alleges that such
19 obstruction was accomplished with discriminatory intent against the class of persons with
20 disabilities, of which he is a member. Plaintiff, however, fails to plead any facts sufficient
21 to allege the existence of such a conspiratorial agreement or facts regarding the Defendants'
22 discriminatory intent. Further, even assuming Plaintiff's allegations of ex parte
23 communications are sufficient to sustain a claim for obstruction of justice, Plaintiff fails to
24 allege any acts of personal participation or discriminatory intent by Defendant Dickerson.
25 As before, claims against Benson, Wait, or the Wait Law Firm failed because, among other
26 reasons, Plaintiff failed to plead the facts regarding the existence of a conspiratorial

1 agreement and Defendants' discriminatory intent. Therefore, any claims against Dickerson
2 based on the actions of Benson, Wait, or the Wait Law Firm are likewise insufficient to
3 survive a Rule 12(b)(6) motion. Accordingly the Court will dismiss Plaintiff's § 1985(2)
4 claim.

5 **4. Section 1985(3)**

6 A complaint based on § 1985(3) must allege: (1) a conspiracy, (2) to deprive any
7 person or class of persons of the equal protection of the laws, or of equal privileges and
8 immunities under the laws, (3) an act by one of the conspirators in furtherance of the
9 conspiracy, and (4) a personal injury, property damage or deprivation of any right or
10 privilege of a citizen of the United States. 42 U.S.C. § 1985 (2010); Thornton v. City of St.
11 Helens, 425 F.3d 1158, 1168 (9th Cir. 2005). For the second element, the complaint must
12 allege that the deprivation was motivated by "some racial, or perhaps otherwise class-based,
13 invidiously discriminatory animus." Orin v. Barclay, 272 F.3d 1207, 1217 (9th Cir. 2001)
14 (quotation and emphasis omitted). Section 1985(3) extends beyond race only "when the
15 class in question can show that there has been a governmental determination that its
16 members require and warrant special federal assistance in protecting their civil rights."
17 Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (quotation omitted).

18 In the present case, Plaintiff failed to plead facts sufficient to allege a conspiracy
19 or an act in furtherance of a conspiracy, leaving the complaint with mere conclusory
20 statements of law. Plaintiff's Complaint does allege instances of ex parte communications
21 by Defendants other than Dickerson and various Nevada judicial officials, but does not set
22 forth facts alleging a conspiratorial agreement between Dickerson and the other Defendants.
23 Even assuming that persons with disabilities are a class protected by § 1985(3), Plaintiff's
24 Complaint fails to allege facts consistent with a deprivation of equal protection of the laws.
25 Further, Plaintiff does not allege facts about any conduct by Defendant Dickerson or facts

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1 that indicate a discriminatory intent on behalf of Dickerson. Therefore, the Court will
 2 dismiss Plaintiff's claims based on § 1985(3).

3 **5. Section 1986**

4 Section 1986 provides for recovery by plaintiffs against individuals who have
 5 knowledge of a § 1985 conspiracy and refuse to prevent it when they have the power to do
 6 so. Accordingly, a plaintiff states a § 1986 claim, "only if the complaint contains a valid
 7 claim under § 1985." McCalden v. Cal. Library Ass'n, 955 F.2d 1214 (9th Cir. 1992).

8 Because Plaintiff's claims under § 1985 fail, so too must his claims under § 1986.
 9 The Court therefore will dismiss Plaintiff's § 1986 claims.

10 **6. Section 1988**

11 Section 1988 allows for attorney's fees in connection with a successful claim
 12 under 42 U.S.C. § 1981, § 1982, § 1983, § 1985, or § 1986. 42 U.S.C. § 1988(b) (2010). To
 13 claim fees under § 1988, a plaintiff must be successful on a claim under 42 U.S.C. § 1981 et
 14 seq. See Porter v. Winter, 603 F.3d 1113, 1116 (9th Cir. 2010).

15 Because Plaintiff's Complaint fails to state a claim under § 1981, § 1983, § 1985,
 16 or § 1986, Plaintiff is not entitled to attorney's fees under § 1988. Accordingly, the Court
 17 will dismiss Plaintiff's § 1988 claims.

18 **C. Count Four: Aiding and Abetting Fraud**

19 Federal Rule of Civil Procedure 9(b) requires a plaintiff pleading fraud to "state
 20 with particularity the circumstances constituting fraud or mistake." The Ninth Circuit has
 21 interpreted this to mean that "[a]verments of fraud must be accompanied by 'the who, what,
 22 when, where, and how' of the misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317
 23 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.
 24 1997)). Additionally, the plaintiff's complaint "must set forth what is false or misleading
 25 about a statement and why it is false." In re GlenFed, Inc. Sec. Lit., 42 F.3d 1541, 1548 (9th
 26 Cir. 1994) (en banc). Rule 9(b) requires that allegations of fraud be "specific enough to give

1 defendants notice of the particular misconduct which is alleged to constitute the fraud so that
2 they can defend against the charge.” Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993)
3 (quotation omitted). Secondary claims of fraudulent activity must be pled in accordance
4 with Rule 9(b)’s heightened pleading standard. See Swartz v. KPMG LLP, 476 F.3d 756,
5 766 (9th Cir. 2007) (“Rule 9(b) imposes heightened pleading requirements where the object
6 of the conspiracy is fraudulent.” (quotation omitted)).

7 Under Nevada law, a claim for fraud must allege:

8 (1) a false representation made by the defendant; (2) defendant’s knowledge or
9 belief that the representation is false (or insufficient basis for making the
10 representation); (3) defendant’s intention to induce the plaintiff to act or to
11 refrain from acting in reliance upon the misrepresentation; (4) plaintiff’s
justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff
resulting from such reliance.

12 Albert H. Wohlers & Co. v. Bartgis, 969 P.2d 949, 957-58 (Nev. 1998). A claim for aiding
13 and abetting fraud must allege that the defendant “knowingly and substantially assisted” in
14 the course of conduct. Dow Chem. Co. v. Mahlum, 970 P.2d 98, 113 (Nev. 1998).

15 Allegations that identify the specific time, place, and content of fraudulent actions by the
16 defendant coupled with allegations of the plaintiff’s reliance and damages are sufficient to
17 withstand a motion to dismiss. Urbina v. Homeview Lending, Inc., 681 F. Supp. 2d 1254,
18 1260 (D. Nev. 2009) (holding the plaintiff’s allegations that defendant knowingly
19 misrepresented the plaintiff’s interest rate and other specifically alleged information at the
20 time of refinancing, that the plaintiff relied on the misrepresentations, and that the plaintiff
21 suffered damages as a result were sufficient to comply with Rule 9(b)).

22 In count four of his Complaint, Plaintiff asserts that Defendant Dickerson aided,
23 abetted, assisted, and ratified a series of fraudulent acts committed by other Defendants to
24 this action. However, Plaintiff’s Complaint fails to give Defendant Dickerson notice
25 specific enough so that he can defend against the fraud charge. While the Complaint alleges
26 instances of improper ex parte contact by Defendants other than Dickerson, it fails to allege

1 the “what, when, where, and how” of Dickerson’s actions which aided, abetted, and/or
2 ratified this course of conduct. Plaintiff’s Complaint does not indicate how Dickerson
3 “knowingly and substantially assisted” in the perpetration of fraud. Further, though
4 Plaintiff’s opposition alleges that Dickerson is liable through his agency relationship with
5 Defendants Wait, the Wait Law Firm, and Benson, the Court dismissed all such claims
6 against those Defendants as inadequate. Paragraphs 61-64 of Plaintiff’s Complaint allege
7 improper ex parte communications with Nevada judicial officials by Defendants Wait and
8 Benson. Plaintiff’s claims of fraud against Wait and Benson were dismissed because,
9 among other reasons, they did not plead Plaintiff’s justifiable reliance and damages. While
10 Plaintiff incurred expense in traveling to a hearing, in doing so he relied on orders from the
11 Nevada state court, not misrepresentations by Defendants. Therefore, even assuming an
12 agency relationship exists, allegations of improper ex parte communications by Wait, the
13 Wait Law Firm, or Benson present in the Complaint are insufficient to state a claim against
14 Dickerson. As such, Plaintiff’s claim for fraud fails to meet the heightened pleading
15 standard set forth in Rule 9(b). The Court therefore will dismiss Plaintiff’s claims for fraud.

16 **D. Count Five: Defamation**

17 To maintain a defamation claim in Nevada the plaintiff must show ““(1) a false
18 and defamatory statement by [a] defendant concerning plaintiff; (2) an unprivileged
19 publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or
20 presumed damages.”” Flowers v. Carville, 266 F. Supp. 2d 1245, 1251 (D. Nev. 2003)
21 (quoting Pegasus v. Reno Newspapers, 57 P.3d 82, 90 (Nev. 2002)). Determining whether a
22 statement is defamatory “is a question of law for the court to decide.” Id.

23 In count five of his Complaint, Plaintiff asserts that Defendant Dickerson made
24 false, libelous, and defamatory statements about Plaintiff. Plaintiff’s Complaint does not put
25 forth the alleged defamatory statements. Therefore, the Court is unable to determine if they
26 are defamatory. Plaintiff’s Complaint also fails to specify which of the Defendants made

1 them, or specify to whom or how the statements were published. Rather, Plaintiff's
 2 Complaint cites the legal elements of a defamation claim without alleging facts sufficient to
 3 support such a claim. Such conclusory statements, by themselves, are insufficient to survive
 4 a motion to dismiss under Rule 12(b)(6). Accordingly, the Court will grant Defendant
 5 Dickerson's Motion to Dismiss Plaintiff's defamation claims.

6 **E. Count Six: Abuse of Process**

7 In Nevada, a claim for abuse of process consists of “(1) an ulterior purpose by
 8 the defendant[] other than resolving a legal dispute, and (2) a willful act in the use of the
 9 legal process not proper in the regular conduct of the proceeding.” LaMantia v. Redisi, 38
 10 P.3d 877, 879 (Nev. 2002) (quoting Posadas v. City of Reno, 851 P.2d 438, 444-45
 11 (Nev. 1993)). The complaint must allege the actions constituting abuse of process. See
 12 Laxalt v. McClatchy, 622 F. Supp. 737, 752 (D. Nev. 1985).

13 In count six of his Complaint, Plaintiff alleges Defendant Dickerson, along with
 14 other named Defendants, is liable for abuse of process. Plaintiff's Complaint fails to allege
 15 Dickerson's actions which allegedly constitute an abuse of process. Plaintiff's Complaint
 16 merely states the Defendant “abused the process” without indicating which of Defendant
 17 Dickerson's actions give rise to such a claim. Plaintiff's Complaint does not allege any
 18 conduct, which if true, would indicate a willful improper use of process with an ulterior
 19 purpose. As such, Plaintiff's Complaint fails to place Defendant Dickerson sufficiently on
 20 notice of the claims against him. Accordingly, the Court will dismiss Plaintiff's claims for
 21 relief based on abuse of process.

22 **F. Count Seven: Violation of Federal RICO Statutes**

23 When bringing a claim for violation of Federal RICO statutes, a plaintiff must
 24 allege and prove “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering
 25 activity (5) causing injury to plaintiffs' business or property.” Ove v. Gwinn, 264 F.3d 817,
 26 825 (9th Cir. 2001) (quotation omitted). The particularity requirement of Rule 9(b) applies

1 to RICO claims where fraud is alleged as part of the racketeering activities. Moore v.
2 Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989).

3 In his seventh claim for relief, Plaintiff asserts that Defendant Dickerson
4 violated, and aided and abetted others in the violation of, Federal RICO statutes. The
5 Complaint does not set forth Defendant Dickerson's activities which allegedly violate
6 Federal RICO statutes. Presumably, the Complaint relies on allegedly fraudulent activity
7 committed by Defendants other than Dickerson to sustain the RICO claims. However, while
8 the Complaint briefly states some actions by Defendant Fetto which allegedly violate Federal
9 RICO statutes, it does not allege how Defendant Dickerson "knowingly and substantially
10 assisted" this course of conduct. In addition, this Court found that all claims based on
11 conduct that predated the filing of the complaint in Wisdom 2 were precluded. The present
12 Complaint alleges Fetto's conduct pre-dating Wisdom 2, and states only that "this conduct is
13 continuing." However, the Complaint does not identify any actions by Fetto that post-date
14 Wisdom 2. This fails the heightened pleading standard set forth in Rule 9(b). Further, while
15 the Complaint alleges conduct by Wait, the Wait Law Firm, and Benson post-dating Wisdom
16 2, this Court previously dismissed these claims as insufficient. As before, assuming an
17 agency relationship, these allegations also would be insufficient to sustain a claim against
18 Dickerson. Accordingly, the Court will grant Defendant Dickerson's Motion to Dismiss
19 Plaintiff's Federal RICO claim.

20 **III. LEAVE TO AMEND**

21 If the Court grants a motion to dismiss, it then must decide whether to grant leave
22 to amend the complaint. Rule 15(a) counsels that courts should grant leave to amend
23 "freely." See also Foman v. Davis, 371 U.S. 178, 182 (1962). Accordingly, "[i]f a
24 complaint is dismissed for failure to state a claim, leave to amend should be granted unless
25 the court determines that the allegation of other facts consistent with the challenged pleading

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1 could not possibly cure the deficiency.” Schreiber Distrib. Co. v. Serv-Well Furniture Co.,
2 Inc., 806 F.2d 1393, 1401 (9th Cir. 1986).

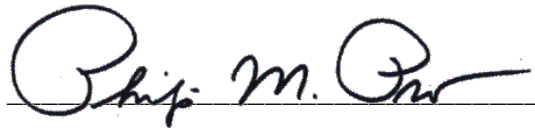
3 Here, Plaintiff may cure the defects in his Complaint if he amends to include
4 allegations of fact sufficient to satisfy Rules 8 and 9(b). The Court therefore will grant
5 Plaintiff leave to amend his Complaint to cure the deficiencies identified herein.

6 **IV. CONCLUSION**

7 IT IS THEREFORE ORDERED that Defendant Jeffrey Dickerson’s Motion to
8 Dismiss for Failure to State a Claim for Which Relief May be Granted (Doc. #174) is hereby
9 GRANTED.

10 IT IS FURTHER ORDERED that Plaintiff may file an amended complaint
11 correcting the deficiencies identified in this Order on or before November 8, 2010.

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13 DATED: October 7, 2010

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16 PHILIP M. PRO
17 United States District Judge
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